

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

CUSTOMS Appeal No. 10146 of 2016-DB

(Arising out of OIA-AHM-CUSTM-000-APP-153-15-16 Dated-30.10.2015 passed by Commissioner of Customs -AHMEDABAD)

C.C.,- AHMEDABAD

CUSTOM HOUSE, NEAR ALL INDIA RADIO,
NAVRANGPURA, AHMEDABAAD-GUJARAT

.....Appellant

VERSUS

RATNAVEER PRECISION ENGINEERING LTD

E-77, GIDC SAVLI, MANJUSAR,
VADODARA-GUJARAT

.....Respondent

APPEARANCE:

Shri G. Kirupanandan, Assistant Commissioner (Authorized Representative)
appeared for the Appellant

Shri Saurabh Dixit, Advocate for the Respondent

**CORAM: HON'BLE MR. RAJU, MEMBER (TECHNICAL)
 HON'BLE MR. SOMESH ARORA (JUDICIAL)**

Final Order No. A/ 10506 /2023

DATE OF HEARING: 17.03.2023

DATE OF DECISION: 17.03.2023

RAJU

This appeal has been filed by Revenue against order of Commissioner (Appeals). The dispute pertains to four bills of entry. In two bills of entries, the respondent has sought to classify under heading 72199090. In one bill of entry they had sought to classify the goods under heading 72192141 and in another bill of entry they had sought to classify the goods under both the headings 72199090/ 72192141. In respect of the last two bills of entries where the heading 72192141 is mentioned in the bill of entry, the respondent filed application under Section 154. Subsequently, show cause notice was issued to the appellant seeking to change the classification from 72199090 to heading 72192141. The original adjudicating authority went beyond the show cause notice and classified the goods under heading 72191200, 72191300 and 72191400. The basic issue was if the goods are covered

by the Notification No. 1/2013-Cus (SG) dated 14.01.2013 imposing safeguard duty on Hot Rolled Flat Products. The heading 72192141 and the heading 72191200, 72191300 and 72191400 were covered in the said Notification while the Heading 7219 90990 was not covered in the said Notification. The show cause notice demanded safeguard duty on account of this reclassification.

1.1 The original adjudicating authority classified the goods under a different heading than the one proposed in the show cause notice. Aggrieved by this order the respondent approached Commissioner (Appeals) who allowed their appeal on the ground that the original adjudicating authority has travelled beyond the show cause notice and on that ground the said order was set aside. Aggrieved by the said order, Revenue is in appeal before Tribunal.

2. Learned Authorized Representative relies on the ground of appeal. He also relied on the decision of Tribunal in case of **Tata Iron & Steel Company Limited** reported at 1987 (30) ELT 771. The said decision holds that even if the tariff item is not correctly mentioned in the show cause notice, demand can still be confirmed under different tariff heading.

3. Learned counsel for the respondent argued that the issue is squarely covered by the decision of Hon'ble Apex Court in case of **Warner Hindustan Limited** 1999 (113) ELT 24 (SC). He argued that once the show cause notice proposes a particular classification it is not open to Adjudicating authority to classify the goods under a different classification. If the revenue wishes to change the classification a separate show cause notice is required to be issued within permissible time.

4. We have considered the rival submissions.

5. We find that the Hon'ble Apex Court has considered practically identical issue in the case of **Warner Hindustan Limited** (supra) in the said decision following has been observed.

2. The appellant manufactures what it calls "Halls Ice Mint tablets". It classified these tablets as "Ayurvedic medicines" under Heading 3003.30 of the Central Excise Tariff. It was issued a notice to show cause why these tablets should not be classified under Tariff Heading 3003.19 as "patent or proprietary medicines". The Assistant Collector, after hearing the appellant, held that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. In appeal by the appellant, the Collector of Central Excise (Appeals) held that the tablets were Ayurvedic medicines classifiable under Heading 3003.30. The Excise authorities went in appeal to the Tribunal and, for the first time, took the stand that the tablets were correctly classifiable under Heading 17.04 as "confectionery". The appellant, of course, stuck to its stand that the tablets were Ayurvedic medicines classifiable under Heading 3003.30. The Tribunal noted that the Assistant Collector had classified the tablets under Heading 3003.19, that is, as patent or proprietary medicines. This was clear indication that the stand of the Excise authorities prior to the stage of the appeal to the Tribunal was that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. The Tribunal also noted that "both sides have not adduced any detailed arguments as to why these tablets can be considered as confectionery item or otherwise although a plea is there from the Collector in the grounds of appeal that the goods are assessable under Tariff 17.04". In our opinion, the Tribunal was quite wrong in these circumstances in allowing the appeal of the Excise authorities and classifying the mint tablets as items of confectionery under Heading 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise authorities making it clear that it was open to the Excise authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionery. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below.

3. In the result, the appeal is allowed. The judgment and order of the Tribunal under appeal is set aside and the appeal filed by the Excise authorities before the Tribunal is dismissed. It shall be open to the Excise authorities to issue to the appellant a notice to show cause why the tablets should not be classified as items of confectionery under Heading 17.04, provided it is open to the Excise authorities to do so in law.

It is also noticed the coordinate bench of this Tribunal in case of Sunrise Traders 2022 (381) ELT 393 (Tri. Amd.) has in similar circumstances observed as follows:

"2.5 Without prejudice to above findings, it is a settled legal position that if the goods are not classifiable under the chapter heading proposed by the revenue thereafter even the goods is classified under the chapter heading claimed by the assessee is correct or not, the case of the department will fail. This gets support from the following judgments:

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“8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter.”

The above decision of the tribunal is based on the view taken by the Hon’ble Supreme Court in the case of WARNER HINDUSTAN LIMITED –(1999) 6 SCC 762 wherein the Hon’ble Supreme Court has held as under:

“In our opinion, the tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before authorities below.”

In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain.

3. Since the revenue has not been able to discharge their burden of proof. Hence the classification of goods declared by the appellants cannot be disturbed.”

6. This decision has been upheld by Hon’ble Apex Court as reported in 2022 (382) ELT 23 (SC).

7. In the aforesaid circumstance, we are unable to accept the claim of the Revenue that the adjudicating authority can classify the goods in a Customs Tariff Heading different from the one proposed in show cause notice. The appeal of the Revenue is dismissed.

(Dictated and Pronounced in the open court)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)